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THE SUCCESSION OF GOTRAJAS UNDER THE MITAKSHARA.

The term '*gotrajas*' literally means 'persons born in the same *gotra*.' It would therefore include not only the *sapindas* and the *samanodakas* as defined in treatises on Hindu Law, but also persons beyond the limits of the *sapinda* and the *samanodaka* relationships but claiming descent from a common ancestor, whatever be the distance in degrees from him. In ancient Hindu law-books, however, the term '*gotrajas*' has not been always used in its literal sense, or in the same sense throughout. This circumstance causes some amount of confusion and difficulty in determining the conditions under which *bandhus* can claim to succeed to the wealth of a sonless deceased Hindu. Under the Mitakshara, *bandhus* come in in default of *gotrajas*, and it is therefore necessary to determine the limits of the class of *gotrajas*. The *gotrajas* are divided into two classes for purposes of succession, *i.e.*, the *sapindas* and the *samanodakas*. There is no dispute about the limits of *sapinda* relationship, but the limits of *samanodaka* relationship are not quite so easy to ascertain, nor is it quite clear whether persons of the same *gotra* beyond the limits of *samanodaka* relationship exclude the *bandhus* or not. We propose to discuss these questions in this article and we proceed to examine what the ancient Hindu law-books have to say on the subject of the limits of *samanodaka* relationship.

Manu says: "The *sapinda* relationship ceases with the seventh degree; but the *samanodaka* relationship (ceases) when birth and name are no longer known." (Manu, V. 60.) Again, the same author, in speaking of the order of succession to the wealth of a deceased sonless Hindu, says: "To the nearest *sapinda*, the wealth belongs; in default of *sapindas*, the *sakulya* is heir or the preceptor

or the disciple." (Manu, IX. 187.) Kullukabhatta in the course of his commentary on this verse interprets '*sakulya*' to mean '*samanodaka.*' Vijnanesvara after indicating the order of succession among *sapindas,* the former of the two classes into which he divides the *gotrajas* (gentiles), says of the latter class, *i.e.,* the *samanodakas*: "If there be no *sapindas* the *samanodakas* take the wealth. These should be understood to reach to seven degrees beyond the *sapindas,* or as far as the limits of the knowledge of birth and name extend. Accordingly Brihat Manu says: 'The *sapinda* relationship ceases with the seventh degree; but that of *samanodakas* extends to the fourteenth, or as some affirm, reaches as far as the memory of birth and name extends. Beyond that is said to be the *gotra.*'" (Stokes' Hindu Law Books. Mit. Chap. II, Sec. V, pl. 6.) The author of the Viramitrodaya says: "The *gotrajas* are the paternal grandmother, the *sapindas* and the *samanodakas* * * *. In default of *sapindas,* the *samanodakas* take the wealth. These extend to seven degrees beyond the *sapindas,* or as far as the knowledge of birth and name extends. Accordingly Manu says: 'The *sapinda* relationship ceases with the seventh degree, but the *samanodaka* relationship extends to the fourteenth, or as far as the recollection of birth and name extends; beyond that is said to be the *gotra.*' We have already proved that by the terms '*bandhu*' and '*sakulya*' used in the text of Vishnu, *sapindas* and *sagotras, i.e.,* men of the same *gotra,* are respectively intended. The *samanodakas* also take the wealth in the order of propinquity." (Golap Chundra Sarkar Sastri's Viramitrodaya, Chap. III, Part VII, pl. 1 and 4.) The Sarasvati Vilasa says: "If none of these is alive, the *samanodakas* take the property. These also are to be understood to be the seven above the *sapindas,* or those who extend as far as the knowledge of birth and name. As Manu says: '*Sapindaship* ceases with the seventh male, and *samanodakaship* ceases with the fourteenth; some say with the remembrance of birth and name. Beyond that is called *gotra*'." (Foulkes's Sarasvati Vilasa, paras. 590 and 591.) The Vyavahara Mayukha says: "All the *sapindas* and the *samanodakas* follow, in the order of propinquity, as enumerated by Manu: 'Now the relation of the *sapindas* [or men connected by the funeral cake] ceases with the seventh person [or in the sixth degree of ascent or descent], and that of *samanodakas,* or those connected by an equal oblation of water, ends only when their birth and family-names

are no longer known." (Stokes' Hindu Law Books. Vya. Mayu, Chap. IV, Sec. VIII, p. 21.) The Vyavahara Madhaviyam says: "In default of *sapindas,* the *samanodakas* take the wealth; the *samanodakas* are those within seven degrees beyond the *sapindas,* or extend so far as knowledge of birth and name extends. That has been stated by Brihat Manu in the text:—'*Sapinda* relationship ceases with the seventh degree, but *samanodaka* relationship ceases with the fourteenth, or as some affirm when birth and name are no longer known." It is not necessary to multiply similar quotations from other ancient Hindu law-books. It may be said that there are two definitions given of *samanodaka* relationship, one limiting it to seven degrees beyond the limits of *sapinda* relationship, *i.e.,* to the fourteenth degree and the other indefinitely extending it to the distance where knowledge of birth and name ceases. It will be seen from the passage of the Mitakshara already quoted that Vijnanesvara does not decide between the two definitions, nor does he even by implication suggest that the more comprehensive definition is not acceptable. He apparently seems to incline equally to either view, for the expression 'or as far as the knowledge of birth and name extends' is Vijnanesvara's own; and he quotes Brihat Manu in support of both the definitions of *samanodaka* relationship.

We shall next proceed to see what modern text-writers on Hindu Law have to say on the limits of *samanodaka* relationship. Mr. Mayne after speaking of the order of succession among *sapindas* says: "The above order, as will be seen, exhausts all the *gotraja sapindas* of the nearer class. Then follow the *sakulyas* or persons connected by divided oblations and the *samanodakas* or kindred connected by libations of water. The former extend to three degrees both in ascent and descent beyond the *sapindas* and the latter to seven degrees beyond the *sakulyas,* or even further so long as the pedigree can be traced." (Mayne's Hindu Law, 5th Edn., Sec. 530.) In support of this view he relies on the passages from the Mitakshara and the Vyavahara Mayukha already quoted. Messrs. West and Buhler say: "Regarding the *samanodakas,* who occupy the next division, it may suffice to remark that according to the principles of interpretation adopted by Vijnanesvara in regard to the passage on *sapinda* relationship, they must be understood to comprise the male

ascendants, descendants and collaterals, beyond the sixth and within the thirteenth degrees, together with their wives or widows, or all those persons who can furnish a satisfactory proof of their descent from a common ancestor. The order of their succession also must be regulated by the same principles as that of the *sapindas*. On failure of *gotraja sapindas*, the *gotraja samanodakas* inherit the estate of a separate householder. *Gotraja samanodakas* are all the male descendants, ascendants and collaterals, within 13 degrees, together with their respective wives; or according to some, all persons descended from a common male ancestor, and bearing the same family-name. The *samanodakas* inherit, like the *sapindas*, according to the nearness of their line to the deceased." (West and Buhler's Hindu Law, 3rd Edn., pp. 132 and 133.) Bhattacharya says that on failure of *sagotrasapindas*, the inheritance goes to the *samanodakas, i.e.*, agnates beyond the seventh degree known to be descended from a common male ancestor in unbroken lines of male descent and quotes the text of Brihat Manu in support of his view. He adds: "*Samanodakas* are not expressly mentioned in the text of Yájnavalkya. But they are included in the term '*gotraja*' in the text. Jimutavahana takes the word '*gotraja*' to denote only *gotraja sapindas*. But according to the plain meaning of the word, it denotes *sapindas* as well as *samanodakas*. Vijnanesvara takes the word to mean *sagotras*. He is therefore obliged to put the *samanodakas* before *bandhus* who are, according to him, *sapindas* connected by blood through females." (Bhattacharya's Hindu Law, p. 296.) In speaking of the succession of *bandhus*, the same author says: "Cognate *sapindas* or *bandhus* succeed after *gotrajas* according to Yajnavalkya's text. *Gotrajas*, according to Vijnanesvara, include all agnates descended from a known common ancestor. The result is, that the cognates cannot succeed so long as there is a single agnate. (*Ibid.*, p. 298.) Rajkumar Sarvadhikari in explaining the meaning of the word '*gotraja*' used in the text of Yájnavalkya above cited says: "A person is a *gotraja* of the deceased, if it can be established that he and the deceased are descended from a common ancestor. Two persons then are *gotrajas*, if their name and lineage could be traced to a common male ancestor. Seven generations are related to each other as *sapindas*. All the other generations 'if the memory of their birth and name is preserved' are related to each other as

samanodakas." (Sarvadhikari's Hindu Law, p. 592.) Again, speaking of the right of succession of *samanodakas*, the same author says: "All persons who bear the same family-name, and can prove that they are lineally descended from a common ancestor, how high soever he may be in the genealogical tree, may claim the relation of *samanodaka*, and are entitled as such to inheritance. Two conditions are necessary to constitute a *samanodaka*. He must be of the same *gotra* as the deceased, and he must trace his descent from a common ancestor. As soon as a person can show that he bears the same family-name, and is a descendant of the same common progenitor, he ranks as an heir, and takes the estate of the deceased on failure of *gotraja sapindas.*" (*Ibid*, p. 686.)

The case-law on the subject is extremely meagre. The only reported case dealing with the questions of the limits of *samanodaka* relationship is to be found at p. 372, I. L. R., 10 Bom. In that case, *Bai Devkore* v. *Amritram Jamiatram* and others, the plaintiff calling herself a *bandhu* of the deceased claimed to recover certain property as against the defendants who were distant cousins of the deceased, being related to him beyond thirteen degrees. It was contended for the defendants that the plaintiff on her own showing was not among the *bandhus* of the deceased, and that even if she were, she was excluded by them, they being related to the deceased as *samanodakas*. Their Lordships of the Bombay High Court without going into the question whether the plaintiff was a *bandhu* of the deceased or not, came to the conclusion, on a consideration of the authorities bearing on the subject, that the more extended meaning of the word '*samanodakas*' contended for by the defendant was acceptable, and that the defendants being therefore related as *samanodakas* to the deceased excluded the plaintiff even if she were a *bandhu* as alleged by her. In a subsequent case which came up before their Lordships of the Madras High Court, the same question arose for consideration. The contest in the case was between a *bhinnagotra sapinda* (bandhu), admitted to be such, of the deceased and a person who called himself a *samanodaka* of the deceased. On the facts, the Courts agreed in finding that the latter was removed from the deceased by more than fourteen degrees; their Lordships however held, following the reasoning and the decision of the Bombay High Court in the case

just above cited, that on the findings of facts the person was a *samanodaka* of the deceased under the Mitakshara and that he excluded the *bandhu* from the succession. This judgment of the Madras High Court is unreported, and as an authority, it may be taken for what it is worth. Thus the case-law on the subject, meagre as it is, is clearly in favor of the more comprehensive acceptation of the term '*samanodaka*' as denoting the second of the two classes into which *gotrajas* are divided by Vijnanesvara for purposes of succession.

Nor can it be urged that this conclusion in favor of giving the wider meaning to the term '*samanodaka*' is repugnant to the genius of the Hindu Law, or the accepted principles regulating the order of succession to the estate of a sonless deceased Hindu under the Mitakshara law. Connection with the deceased through an unbroken line of males gives admittedly a better right to the estate of the deceased than a claimant's relationship to the deceased in which a female intervenes. Of course, it would be urged that if this were a correct view of the law, the *bandhus* related as *sapindas* to the deceased would be postponed in the matter of succession to agnates of the deceased, though removed by more than fourteen degrees from him. True; but this legitimate result of accepting the wider definition of *samanodaka* relationship cannot possibly militate against one's sense of propriety. If a claimant removed by thirteen degrees from the propositus and connected with him through an unbroken line of males is allowed to succeed to his estate in preference to so near a *bandhu* of the propositus as his sister's son, it is difficult to understand how one fourteen or fifteen degrees removed loses this preference. It would, of course, be urged that, if this argument were sound, *bandhus*, however closely related to the propositus, could not come in so long as any *gotraja* of the deceased is alive, and that this result could not have been contemplated by the author of the Mitakshara who makes so much of propinquity as a ground of succession. Our answer is that, studying closely what Vijnanesvara has said on the subject of the succession of *gotrajas*, one would be led to think that, according to Vijnanesvara's view, the *bhinnagotra sapindas* or *bandhus* of the deceased should come in after all the agnates, *i.e.*, men of the same *gotra* with the deceased are

exhausted. Vijnanesvara says that by the term '*gotrajas*' are meant the paternal grandmother, the *sapindas* and the *samanodakas*. He then indicates the order of succession among the *sapindas* and proceeds to define the *samanodakas* as agnates of the deceased extending to the fourteenth degree, or as far as knowledge of birth and name extends. Then proceeding to lay down the succession of *bandhus*, he says that they come in after the *gotrajas* or gentiles. Having already stated that the *samanodakas* succeed in default of *sapindas*, one would naturally expect the author of the Mitakshara to say that the *bandhus* succeed in default of *samanodakas* and not in default of *gotrajas*, if *gotrajas*, *i.e.*, men of the same *gotra* remoter than the *samanodakas* had no title, in his opinion, to succeed in preference to *bandhus*.

Again, it is clear that *sapindas*, *i.e.*, *sapindas* of the same *gotra*, succeed first in preference to the *samanodakas* and the *bandhus*, because of their being of the same *gotra* and of their *sapinda* relationship. Now, the question naturally arises whether the being of the same *gotra* and the *sapinda* relationship should co-exist in the same claimant to give him a right of succession, or if each in itself is sufficient to confer the right, which of them gives the preferable right? The fact that the *samanodakas* and the *bandhus* are each mentioned among the classes of heirs shows that each of these two grounds of the right of succession is sufficient in itself to confer the right. Then the only question is which of them confers the preferable right. If *sapinda* relationship could do that, the *bandhus*, *i.e.*, the *bhinnagotra sapindas* according to Vijnanesvara, should succeed before the *samanodakas*. But they do so, according to Vijnanesvara, only after the *samanodakas*. Thus it is clear that according to Vijnanesvara, the being of the same *gotra* is to be preferred to *sapinda* relationship as a ground of the right to succeed. On this view, men of the same *gotra* with the deceased should succeed before his *bandhus*.

It may be objected that the clause in the passage of the Mitakshara above quoted, *i.e.*, "the *gotrajas* are the paternal grandmother, the *sapindas* and the *samanodakas*", is a complete definition of the term '*gotrajas*' and that men of the same *gotra* not coming within the definition of *samanodakas* are not heirs under the Mitakshara. In reply we urge that the clause cannot possibly have been

intended to serve as a definition of *gotrajas* for the following reasons: first, the specific mention of the paternal grandmother who does not represent a class indicates that no definition of the word '*gotraja*' was intended; secondly, the clause is evidently intended to indicate the order of succession among *gotrajas*, as is shown by the special mention of the paternal grandmother as the first among the heirs coming under this class. It may well be argued that Vijnanesvara's intention in saying that *gotrajas* are the paternal grandmother, the *sapindas* and the *samanodakas*, was simply to mention particular classes of *gotrajas* of whom he had something special to say. The classes of *sapindas* and *samanodakas* are subject to limitations other than those inferrible from the use of the term 'gotrajas' and Vijnanesvara may have specially mentioned these two classes of *gotrajas* for the purpose of defining them and their rights of succession. Men of the same *gotra* remoter than the *samanodakas* are not capable of being further defined than as men of the same *gotra* and their rights of succession being governed by the general principle of propinquity, Vijnanesvara had nothing special to say about them. Again, if the clause is to be construed as a definition of the term 'gotrajas,' it must be conceded that in construing the term '*gotrajas*' as he has done, Vijnanesvara has narrowed its literal acceptation. We can, of course, well understand that he would have done so, if that course was necessary to make the import of the term '*gotrajas*' consistent with the main principle of his law of Inheritance. But the literal and more comprehensive meaning of the term '*gotraja*' is perfectly consistent with the principle which admittedly postpones the *bandhus* to the *samanodakas*. It is therefore rather unreasonable to believe that Vijnanesvara understood the term '*gotrajas*' in any other than its literal sense. It may also be argued that under the wider definition of the term '*samanodakas*' which Vijnanesvara apparently accepts as well as the narrower one, men of the same *gotra* can claim to be ranked among the *samanodakas* and that there was no necessity for their special mention.

Again, men of the same caste, men who are not related to the deceased, such as the pupil and the fellow-student, are named among the heirs to a deceased sonless Hindu. Is it then probable that men of the same *gotra* were under no circumstances intended

to be heirs? Surely men of the same *gotra* must be preferred to men of the same caste, and when the latter are mentioned among the heirs in the ancient Hindu Law books, the former must be. If this view be correct, under what term in Yajnavalkya's text "the wife, the daughters, etc.," could men of the same *gotra* be included, except under the term '*gotrajas*?'

There are also texts which lay down the succession of men of the same gotra as such. Gautama says: "*Sapindas, sagotras, i.e.*, those connected by descent from the same Rishi (*Vaidika gotra*), and the wife shall share the estate of the person deceased without issue." (Gautama, Ch. XXVIII. 21.) Vishnu says: "On failure of the brother's son, the wealth goes to the relations called *bandhu*; on failure of them, to the relations called *sakulya*" (Vishnu, XVII. 10 & 11.) The author of the Vivadaratnakara interprets the term 'bandhus' to mean *sapindas* and the term 'sakulyas' to mean men of the same *gotra*. (Vivadaratanakara on Inheritance, Chap. XXXIV.) The author of the Viramitrodaya also understands the words 'bandhu' and 'sakulya' in the text of Vishnu to mean 'sapindas' and 'men of the same *gotra*' (Viramitrodaya, Chap. III., Part VII., Section 4.) Narada says: "On failure of daughters, the *sakulyas*, and the *bandhavas*; next a *sajati*; in default of all, it goes to the king." (Narada, XIII. 51.) The commentators explain the term '*sajati*' to mean a descendant from the same Rishi. (II. Cole. Dig., Part V. 8, 448.)

It seems to be therefore fairly clear from an examination of the ancient authorities on the subject that men of the same *gotra* are as such among the heirs of a sonless deceased Hindu. It may be urged that among the different subsections of the Brahmin caste men of the same *gotra* can be found and that it would be absurd if one member of one subsection of the caste could succeed to the property of one belonging to a different subsection of the same caste. But it should be remembered that these subsections are of comparatively modern origin and that the sacred Codes of law were written long before these subsections came to be recognised. In some of the Hindu law-books, however, there are to be found some limitations to the class of men of the same *gotra* entitled to succeed as such. For instance, a passage from the commentary on the Dayabhaga of Jimutavahana extracted at foot of page 205 of the

Bombay Edition of Yajnavalkya's text with the Mitakshara says: "In default of him, *sagotras*, *i.e.*, men of the same *gotra* and men of the same *pravara* living in the same village with the deceased respectively take the wealth." The author of the Dayakrama Sangraha also says: "In his default persons bearing the same family-name being inhabitants of the same village succeed. On failure of them, persons, inhabitants of the same village and descended from the same patriarch are the successors according to the text of Gautama." (Stokes' Hindu Law Books, page 484, paras. 30 & 31). These limitations sufficiently narrow the circle of men of the same *gotra* who may lay claim to the estate of a sonless deceased Hindu.

Though this is the view of the law suggested by an examination of the ancient Hindu Law texts bearing on the subject, we are yet to hear of a person of the same *gotra* as such claiming a right to the estate of a sonless deceased Hindu in preference to a *bandhu*. There have been very many cases in which distant *bandhus* of the deceased have claimed the estate of a sonless deceased Hindu, but in none of these cases has a person on the ground of his being of the same *gotra* with the deceased objected to the title of the *bandhus* to succeed, nor has any of the defendants in such suits sought to put the plaintiff out of Court on proof of the allegation that there was in existence, as there must always have been, a nearer heir to the deceased in the person of some one of the same *gotra*. The fact that no such contention has ever been raised in Courts of law, notwithstanding the large number of cases in which it could have been raised is almost conclusive proof that the contention was not considered to be supportable; or it may as well be that the term '*sagotra*' found in some of the texts of ancient Hindu Law books bearing on the subject of succession has not been understood by the public to denote all men who claim to belong to the same *gotra* on the strength of mere tradition and usage but to denote only such of them as could clearly trace their birth to the same ancestor. To lay down the succession in preference to *bandhus* of men of the same *gotra* (traditional descent from the same Rishi) would be postponing the succession of *bandhus* indefinitely to persons who on the well-recognised principle of propinquity can have no manner of claim to the estate of the deceased. Whatever therefore be the law on the subject as gatherable

from ancient Hindu Law treatises, it must at this day be admitted either that custom has virtually over-ridden the ancient law on the right of men of the same *vaidikagotra* as such to succeed to the estate of the deceased, or that the meaning of the term *sagotra* has by common consent been narrowed to denote only those persons that can clearly trace their pedigrees to the same common ancestor.

S.

TRANSLATED FROM THE MADANA PARIJATA.

The order of succession to the property of a deceased divided parcener leaving neither son nor grandson.

On this subject, Yajnavalkya says: "The wife, the daughters likewise, both parents, brothers, likewise their sons, the gotrajas, bandhus, the disciple and the fellow-student; of these, on failure of the preceding, the next in order is the heir to the estate of one who has departed for heaven, leaving no issue; this rule extends to all classes."[1] Wife] one who had been duly married. The singular is with regard to the caste. Therefore if they are equal or unequal in caste, they shall divide the wealth and take their proper shares according to the rule laid down in 'four, three, two and one shares.'

In default of the wife, the daughters take. So also Kâtyâyana: "The wife takes the wealth of the husband if she remains chaste; in her default, the daughter if she is unmarried."[2] By the distinction laid down in 'if she is unmarried' it is understood that in case both married and unmarried daughters exist, the unmarried only take; in default of the unmarried, the married take. Even among the married, the poor alone first take; and in their default only, the rich; as the reasoning employed in the rule laid down by Gautama: 'stridhana goes to the daughters unmarried and unprovided for' applies equally to the paternal wealth.

In default of the daughter, the daughter's son even is the heir; as laid down by Vishnu: "If there exist neither sons nor grandsons of a person, the daughter's sons shall take the wealth; for the male offspring of a son and of a daughter are considered equally qualified to perform the obsequies for the person."[3] This meaning is also inferred from the use of the particle 'also' made use of by Yâjnavalkya in the text, 'the daughters also.'

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1. Yajnavalkya, II. 135. 2. Not found. 3. Not found.

In the absence of the daughter's son, the parents are the heirs. Parents, *i.e.*, mother and father. The order of mention in the expansion of the compound must also be understood to apply to the taking of wealth. Hence the mother takes first; and in her default the father. This order in the whole sentence 'the wife, the daughters, etc.' is stated in the latter portion of the passage, 'in default of the preceding, the succeeding is the heir'; and that all that is correct is laid down by us in the 'inheritance' chapter of the Subodhini, a commentary on the Mitakshara; and it is not here written for fear of redundancy.

In default of the father, the brothers (take); here also it is to be understood that the uterine brothers take first, because of their nearness of relation owing to their being born of the same mother, and that in the absence of uterine brothers, the half-brothers succeed; heirship should be understood to arise according to the nearness of relation. 'To the nearest sapinda, the inheritance next belongs'; the meaning is that he among the sapindas who is the nearest related by particles of body shall take the wealth (of the deceased). In default of brothers of both the classes, their sons, *i.e.*, brothers' sons take; even here, the sons of uterine brothers take first; in the absence of these, the sons of half-brothers. If, however, a brother dies and his wealth goes to the brothers according to the rule laid down in "the wife, the daughters also," and if before the partition of that takes place one of the brothers dies leaving sons, then the sons shall certainly get their father's share, according to the rule 'among sons of different fathers, the allotment of shares is according to the fathers'. 'The gotrajas'; by this term is meant the paternal grandmother, the paternal grandfather, his sons, and their sons, and in their default the paternal great-grandmother and the rest; and in default of them also, the samanodakas take (the property). Here this is the order. In default of brothers' sons, the paternal grandmother takes the wealth; in her default, the paternal grandfather; for just as the father has a right to the property only after the mother, so also the succession of the paternal grandfather is only after the grandmother. In default of the paternal grandfather paternal uncles succeed, in the same way as brothers in default of the father. Even here the relative position of brothers of full and of half blood is the same: the sons of the paternal grandmother take the inheritance first and in their default the sons of

the co-wives of the paternal grandmother. In default of even these, the sons of paternal uncles succeed in the same way as the brother's sons (when brothers of both kinds are extinct). In their default, the paternal great-grandmother; in her default, the paternal great-grandfather; in his default, the sons of the paternal great-grandfather. Thus the order of heirs up to the seventh degree should be known by the rule 'in the absence of the brother, his sons succeed.' In default of sapindas to the seventh degree the samanodakas succeed; and in this case also, the aforementioned distinction of nearness of relation should be applied. In the absence of Gotrajas, Bandhus take the wealth. Bandhus are of three kinds, *viz.*, Átmabandhus, Pitribandhus and Mátribandhus; as is laid down by Vriddhasátátapa: "The sons of one's father's sister, the son's of one's mother's sister, and the sons of one's mother's brother, are known as Átmabandhus. The sons of one's father's father's sister, the sons of one's father's mother's sister, and the sons of one's father's mother's brother are known as one's Pitribandhus. The sons of one's mother's father's sister, the sons of one's mother's mother's sister, and the sons of one's mother's mother's brother, are known as Mátribandhus."[1] In this case also, according to the order of enumeration, the Átmabandhus get the wealth first, because of their nearness of relation. Similarly, in default of them the Pitribandhus; and likewise in default of the Pitribandhus, the Mátribandhus. This is the order. In default of even the bandhus, the preceptor (takes;) and in default of the preceptor, the pupil.

So also, Ápastamba: "In the absence of sons, the nearest sapinda relation takes; in his default, the preceptor; in his default, the disciple; in default of the disciple, a fellow-student, whose Upanayana was celebrated by, or who was studying under, the same preceptor (as the deceased); in default of the fellow-disciple also, Srotriyas inherit the wealth."[2]

This is laid down by Gautama: "Srotriyas shall take the wealth of a deceased Brahmin leaving no issue."[3] A Srotriya] one who has studied one Sákhá (of the Veda). In the absence of even a Srotriya, any Brahmin who is near shall take.

1. Attributed to Baudhayana in many places but not found.

2. Ápastamba, II. 6, 14, 2 & 3.

3. Gautama, XXVIII, 41.

So also Manu: "In default of all, Brahmins who are well-versed in the three Vedas, pure and who have controlled their senses, shall take the wealth."[1] Never shall the king take the wealth of a Brahmin; for it is stated by Nárada: "The wealth of a Brahmin, on his death without any heir, should be given only to Brahmins; otherwise the king becomes tainted with sin."[2]

Manu: "The wealth of a Brahmin shall never be taken by the king; this is eternal law."[3]

The wealth of a Kshatriya, etc., in the absence of all heirs down to the fellow-student is taken not by Brahmins but certainly by the king. That is laid down by Manu: "The wealth of persons of other castes, in the absence of all heirs, the king takes."[4]

Yájñavalkya states an exception to the mode of inheriting by sons, etc., in order: "The heirs to the wealth of an ascetic, a sanyasin and a brahmacharin are in their order, the preceptor, the virtuous disciple, and the brother in holiness of the same order."[5] Brahmachárin] permanent student, not one who wishes to pass into the order of a householder. Virtuous disciple] one who has studied and meditated upon the knowledge of Átman. Brother in holiness] one who is regarded as a brother. Ekatirthi] one of the same order of life, *i.e.*, an ascetic who lives in the same order. One who is a brother in holiness and belongs to the same order of life is a brother in holiness of the same order. Here the word 'order' (in 'in their order') intends inverse order. (Thus) the wealth of an ascetic, *i.e.*, food, etc., acquired in the manner laid down in the text: "Let him hoard wealth sufficient for a day, a month, six months or a year, and let him abandon all that in the month of Asvayuja,"[6] a fellow-student takes. The wealth of a sanyasin consisting of cloths, books, etc., the virtuous disciple takes. The wealth of a permanent student consisting of books, etc., the preceptor takes.

Partition among reunited brothers.

On this subject, Yájñavalkya: "A reunited brother shall take the wealth of a reunited brother; and a uterine brother that of a uterine brother. One born of a different mother, if reunited, shall

1. Manu, IX. 188.
2. Not found.
3. Manu, IX. 189.
4. Do.
5. Yajuavalkya, II, 140.
6. *Ibid.*, III, 47.

take the wealth; but not one born of a different mother if not reunited. A uterine brother even if not reunited shall obtain (the wealth) and not a brother born of a different mother, even though reunited".[1] The property which was once divided but afterwards mixed is called samsrishta; he who has such wealth is called samsrishtin (reunited). The wealth of such a person if he dies without sons or grandsons, the reunited parcener shall take, even though his wife be present. The singular in 'samsrishti' is purposeless. Therefore (the meaning is) the reunited parceners shall divide the wealth and take their shares; and they shall also maintain the widow (of the deceased).

Reunion can take place only with the father, brothers and paternal uncles, and with nobody else. That is laid down by Brihaspati: "He who being once divided, lives again, through affection, together with his father, brother or paternal uncle, is termed reunited."[2] If while the wife of the deceased, whose pregnancy was not manifest, was alive the reunited parcener's divide and take his wealth, and if subsequently of this pregnancy a son be born, then the wealth of the reunited parcener should be handed over to the son; it is to be understood in the latter portion also.

"A uterine brother of a uterine brother"; the wealth of a reunited parcener, a mere reunited parcener alone shall not take, but a uterine brother shall take; not a half-brother. "One born of a different mother, if reunited, (shall take the wealth); but not one born of a different mother, if not reunited; a uterine brother shall take even though not reunited; but not one born of a different mother though reunited." One born of a different mother, if he be reunited, shall take the wealth; one born of a different mother if he is not reunited shall not take. This is inferred by the use of the expression 'even if not reunited' in the text: "A uterine brother shall take even if not reunited." In the case of the half-brother, reunion alone is the ground of his taking the wealth; the word 'not reunited' is equally related to both what follows and what precedes, like the eye of a crow. Therefore 'though not reunited, he takes the wealth if united' is a separate sentence. 'Though not reunited', *i.e.*, though his separate wealth had not been mingled with the wealth of others. One reunited, born of the same womb takes the wealth of the

1. Yajnavalkya, II. 138 & 139. 2. Brihaspati, XXV. 72.

deceased reunited brother. By this it is indicated that his being uterine is the only ground of his taking the wealth. Here the word 'not reunited' is understood in the latter half of the passage also as it is in the former. Therefore 'one born of a different mother, even though reunited shall not (take)' is the latter portion of the text. In this sentence by the word 're-united' is denoted '(any) reunited parcener' and not only 'a uterine brother reunited.' Even if the reunited be one born of a different mother, the brother born of a different mother alone takes the wealth. Here the particle 'eva' (alone) if taken in the light of Manu's text means this. Where there is a uterine brother not reunited and a half-brother reunited, then the uterine brother shall get a share of the wealth, owing to his being born of the same mother; and the half-brother also takes another share owing to the existence in his case of the relation of reunion.

Manu also: "If divided brothers again living together institute a second partition, then the partition shall be equal; there is no right of primogeniture in this case. The deduction for the eldest is one-twentieth of the property and the best of all chattels"[1]; the meaning is nothing implying unequal partition should take place. Likewise: "If among them, one whether the eldest or the youngest loses his share or dies before partition, his share is not lost."[2] The meaning is this: if among reunited brothers one whether eldest or youngest, is, before shares are allotted, deprived of his share on account of entering another order or being put out of caste, or dies, his share is not lost. His share therefore should be separated and kept; but they should not divide and take it. How the separately kept property should be disposed of is laid down thus: "Such of his uterine brothers as are reunited, having assembled shall divide his wealth, as also uterine sisters."[3] In these two texts by the use of the two expressions 'uterine brothers' and 'brothers', 'uterine brothers' should be understood to mean 'brothers born of the same mother' and 'brothers' to mean 'brothers born of different mothers'; otherwise there would be redundancy. 'Those of his uterine brothers who are reunited'; here by the use of the expression 'reunited' it is meant that those uterine brothers who are denoted by that expression shall

1. Manu, IX. 113. 2. Manu, IX. 211. 3. *Ibid* IX. 212,

divide; and by the word 'reunited' not being used, even those uterine brothers who are not reunited are also meant. Therefore the meaning of the text is this: the uterine brothers though not reunited, and likewise those who have gone to a foreign country shall assemble together and divide the reserved wealth in equal shares, *i.e.*, with no greater and less shares. So also those reunited half-brothers of the same caste; and also uterine sisters. The meaning is that all those from uterine brothers to uterine sisters shall divide the wealth in equal shares. The partition in the case of reunited half-brothers of other castes shall be according to the rule laid down in the text: 'four, three, two and one share respectively'. As the use of the word 'samam' is sufficiently justified by its application to the case of half-brothers of the same caste, excluding brothers of different caste, there is nothing to prevent the application of the rule in the text, 'they take four, three, two and one shares respectively.'

Sankha says: "If one among the brothers die leaving no issue, or if one of them enter another order; the rest (of the brothers) shall divide his wealth, excepting the stridhana; or they should give maintenance for life to those of his wives as keep unsullied their husband's bed; and they may cut off that allowance in the case of others."[1] Others] those who do not keep their husband's bed unsullied.

Brihaspati: "He among the reunited parceners who earns more wealth by his learning, valor, etc., should be given two shares; and the rest shall be equal sharers."[2] The allotment of two shares should be understood in case he acquires greater wealth. Here the meaning is this: In default of reunited half-brothers, he among the uterine brothers who is reunited shall take the wealth of a reunited brother dying without issue; in default of not reunited uterine brother, he among the half-brothers who is reunited shall alone take the wealth. Here also among half-brothers, if some of them are of the same caste and others of dissimilar castes, then it should be inferred that the rule laid down in the text: 'they take four, three, two and one shares respectively' applies. Where the deceased's uterine brothers and half-brothers are reunited, then all of them shall take in the manner above mentioned. If the reunited brothers

1. Narada, XIII. 25 and 26. 2. Brihaspati, XXV. 77.

are half-brothers, and the non-reunited are uterine, then also uterine and half brothers shall take; if the reunited brothers are uterine and the non-reunited are half-brothers, then the uterine brothers alone shall take. If some of the uterine brothers are reunited and some others are not, then the reunited uterine brothers shall take; because of their double relation, *viz.*, being reunited and being uterine. In all cases the widow gets her maintenance. Some say that the distinction here stated between brothers arising from being born of the same mother and of different mothers should be applied in the case of father's uterine brothers and father's half-brothers, by parity of reasoning. That is not reasonable; the text 'of the uterine brother, the uterine brother' lays down a special rule; as there is no reason to think that reunited brothers alone are not meant by the text, the term 'uterine brother' cannot include the paternal uncle; and as such a construction is inconsistent with the practice in the world; the mode of reasoning does not apply here, being opposed to the express texts. Therefore the whole is unexceptionable.

Persons incompetent to inherit.

On this subject, Yájñavalkya: "The impotent, the outcast, his son, the lame, the insane, the idiot, the blind, and persons suffering from incurable diseases; these should be maintained, they being ineligible for a share."[1] His son] the son begotten by an outcast before the prayaśchitta (expiation) is performed. Lame] devoid of a leg. The insane] incurably affected with insanity due to the combined effect of wind, bile and phlegm or to devil-possession. Idiot] one whose mental faculties are impaired, *i.e.*, one who is incompetent to know what is good from what is bad. Persons suffering from incurable disease] persons suffering from chronic diseases as scrofula, etc. By the particle 'etc.' are included the enemy of the father, etc.

Likewise Nárada: "The enemy of the father, the degraded, the impotent, one who has committed sin, these, even though they be aurasas, do not get shares. How could they if they be kshetrajas?"[2]

Vasishtha: "Persons who have entered a different order are shareless."[3] Different order] the orders of a perpetual student, ascetic and sanyasin.

1. Yajnavalkya, II. 140. 2. Nanda, XIII. 21, 3. Vasishtha, XVII. 52.

Manu: "The impotent and the degraded, persons deaf and blind, from their birth, likewise the insane, the idiot and the dumb and also those who are devoid of an organ, are shareless."[1] Persons devoid of an organ] persons whose sensory organs have been impaired by disease and the like. These do not get shares, but should be maintained. So says Manu: "It is proper that wise men should give according to ability maintenance to these without stint; if he does not give, he shall become degraded."[2] These] persons excluded from inheritance. Without stint] for life. The exclusion of these from inheritance is only where prior to division they are subject to irremediable defects; but if one subject to defect, at the time of partition, is cured of it after partition by medicine, etc., or by expiatory ceremonies, then he certainly gets his share on the principle laid down in the text: "the son begotten after division on a woman of the same caste takes a share."[3] The masculine gender in the words, *patita*, etc., is of no consequence, being found in the terms denoting the subject. Therefore the mother, the wife and the daughters if ill-behaved are certainly shareless. The impotent and the rest alone are incompetent to inherit; not their sons if they are free from defect.

So also Yájñavalkya: "The *aurasa* and the *kshetraja* sons of these are takers of a share if they are free from defect. The daughters of these should be maintained till they are provided with husbands. The sonless wives of these conducting themselves aright should be maintained, but if they are unchaste and perverse, they should be expelled."[4] The impotent can have only kshetraja sons; the rest may have aurasa and kshetraja sons. By the mention of aurasa and kshetraja sons alone, it is understood that the other kinds of sons have no shares. The appointed daughter also gets a share, as she is equal to the aurasa. So she is also denoted by the term 'aurasa'. The daughters are to be maintained however till marriage. The sonless wives of the impotent and the rest if well-behaved should be maintained. But the unchaste wives should be expelled.

Accordingly it is said: "The wives who are unchaste and perverse likewise should be expelled." Should only be driven out: the perverse should be maintained, as they are free from unchastity.

1. Manu, IX. 201.
2. *Ibid*, IX. 202.
3. Yajnavalkya, II. 122.
4. *Ibid*, II. 141 and 142.

On impartible property.

On this point Yajnavalkya: "What else is acquired by oneself without detriment to the paternal estate, as presents from a friend, and gifts at the time of marriage, do not belong to the (rest of the) coheirs. He among the coheirs who recovers property descended in regular succession but taken away, need not give to the rest of the coheirs; as also wealth acquired by learning."[1] Without detriment to the paternal wealth] no injury being done to the father's wealth; this goes with 'presents from a friend, etc.' Presents by a friend] what was received from a friend. That parcener who among coparceners, such as sons, etc., recovers after being permitted property which was duly descended from father to son, but which was taken away by others and which was not recovered by the father and the rest owing to lack of ability, need not give that property to the other coheirs. But the recoverer only shall take it.

Sankha, however, states a distinction in the case of land which was taken away and subsequently recovered: "He who recovers by labor the land previously lost shall be given a fourth part and the rest shall divide according to shares."[2] The meaning is that the rest of the coheirs should, after giving to the recoverer a fourth part, divide the remaining land with the recoverer and take their respective shares. Wealth acquired by learning] acquired (as remuneration) for teaching, explaining the purport of the Vedas, the recitation of the Vedas, and for studying the Vedas, etc. As impartibility is stated as regards the property acquired from friends, etc., only when it is gained without any detriment to the paternal wealth, it is in effect said that presents from a friend, etc., when acquired to the detriment of the paternal estate are certainly divisible.

Here as the expression 'acquired without detriment to the paternal estate' qualifies only 'wealth got as presents from friends etc., or for learning'; therefore it is understood that wealth acquired as acceptance of gift even to the detriment of the paternal wealth, is certainly divisible; and such a practice is also observed.

Nárada: "A brother who looks after the family of another brother engaged in the acquisition of knowledge, shall get a share

1. *Ibid*, II. 118 and 119.

2. II. Col. Dig. 464. CCLIX.

in the wealth, acquired by such learning, even though unlearned himself."[1]

Kátyáyana: "Wealth obtained by learning acquired while being maintained by another is called wealth acquired by learning."[2]

Manu: "Let one not give to his coheirs what was acquired by him by labor, without injury to the paternal wealth; as also wealth obtained by learning."[3] By labor] by service, war, etc.

Similarly: "Cloths, vehicles, ornaments, cooked rice, water and women, yogakshema and pasture ground for cattle; these are declared impartible."[4] The impartibility stated in respect of cloths is only in the case of cloths that have been worn. Vehicle] carriage, horse, palanquins, etc. In this case whatever is used by one should not be divided; or *patra* may mean money secured by documents.

So also Brihaspati: "Having discharged the debts secured by documents."[5] Discharged] paid up.

Kátyáyana: "Money secured by bonds." Here the meaning is this: only so much of the debts, as is undischarged, is impartible.

Brihaspati: "The manner above mentioned should be understood to apply in the case of debts secured by bonds. That should be cleverly divided, or else it will become useless. The cloths and ornaments should be divided, by selling them; the debts secured by documents by discharging them; and dressed rice by exchanging it for undressed rice."[6] Where there are many horses, etc., they are certainly divisible among parceners where they live by dealing in such animals. If goats, etc., are indivisible, being unequal in number, then they belong to the eldest.

So also Manu: "A single goat or sheep should never be divided. It is declared that a single goat or sheep should be given to the eldest."[7] Whatever ornaments are worn by any one are indivisible. So Manu: "The ornaments worn by females during the lifetime of the husband, let the coheirs not take; if they take,

1. Narada XIII. 10.
2. II. Cole. Dig. 444. CCCXLVII.
3. Manu, IX. 208.
4. *Ibid* IX. 218.
5. Brihaspati, XXV.
6. Brihaspati, XXV. 80 and 81.
7. Manu, IX. 119.

they shall be degraded."[1] Here 'worn' means given to them out of affection, etc., to wear so as to produce in them an exclusive ownership. Dressed rice] cakes, etc. That should be eaten by all the coheirs together. Water] its reservoir, *i.e.*, wells, etc.; this too is indivisible; but should be made use of by turns. Women] female slaves; women of the seraglio. Where the female slaves are unequal in number, they should be made to do duty by turns; if they are equal in number, they should be divided. Even if the women of the seraglio are equal in number, they are not divisible.

That is laid down by Gautama: "There is no division of females who had had cohabitation."[2] Females who had had cohabitation] women of the seraglio. Yogakshema]; Yoga is the getting of what was not got already; by the word 'Yoga' are denoted those rites performable by srauta and smárta fires which are the causes of acquiring what was not got already. By the word 'kshema' are denoted conservatory acts such as gifts outside the altar, construction of tanks, laying out of gardens, etc., for the purpose of protecting what has been already acquired.

These two, though belonging to the father are not divisible; even though to the detriment of the paternal wealth, they are not divisible; according to the text of Laugakshi: "Kshema is a conservatory act; Yoga is a sacrificial act; so sages declare. They are declared to be impartible, as also bed and chairs."[3] Some others hold that by the term 'Yogakshema' are meant ministers, purohits, who afford prosperity (Yogakshema); others yet are of opinion that missiles, cowtails, umbrellas, shoes and the like are meant. Prachára] the way of ingress and egress to and from houses, gardens, etc. Here 'inequality' means inequality in the value of shares given and not in the number of articles given; as, if there are four sons and three horses, here, the inequality is due to the indivisibility into four shares.

As for another text: "Sacrificial things, kshema, vehicle, dressed rice, water and women; these are indivisible among sagotras even though descended for a thousand generations",[4] that has reference to the kshatriya and other sons of a man of the Brahmin

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1. *Ibid* IX. 200.
2. Gautama, XXVIII. 47.
3. Not found.
4. Not found.

caste; because of the particular text: "Land obtained by acceptance of gift should never be given to the kshatriya son, etc."[1] Sacrificial things] things obtained by sacrifices.

It has been said that wealth acquired by valor, etc., is indivisible; but Vyása lays down an exception: "If a coheir depending on common wealth gain by valor something such as carriages, etc., the brothers are sharers therein."[2] Common] mingled wealth; depending upon it.

Yájñavalkya: "In the case of an addition made to the common wealth, the division is declared equal."[3] The meaning is that if the united wealth is increased by agriculture, trade, etc., then the shares of all are equal, and two shares should not be given to the acquirer.

Supplementary provisions regarding partition.

On this subject, Yájñavalkya: "Property withheld by one coheir from another and which subsequently comes to light, they shall again divide it in equal shares; this is fixed law."[4] The meaning is that if any property concealed from one another is discovered after partition, they shall divide it in equal shares only; they need not give a deduction of one-twentieth in favor of the eldest according to the text: "To the eldest, a twentieth."[5]

Likewise: "In case the partition is doubted, the fact of partition should be ascertained by means of relatives, bandhus, witnesses and documents and by houses and lands separately held."[6] If after partition a doubt arises in course of time as to the fact of partition, then the ascertainment of the partition should be made by means of gnatis, paternal relations, maternal relations as maternal uncles according to the aforesaid description, by witnesses and written partition-deed, and likewise by separate possession of houses and lands. The meaning is that it may also be ascertained by their separate performance of agriculture, and of the five mahayajnas.

Narada: "If a doubt exist about the fact of partition, then it should be ascertained by gnatis, partition-deed and separate

1. Brihaspati, XXV. 30.
2. II. Cole. Dig. 281, CX.
3. Yajnavalkya, II. 120.
4. *Ibid* II. 126.
5. Manu, IX. 112.
6. Yajnavalkya, II. 149.

transaction of affairs. Among unseparated brothers the performance of religious duties is single; when partition has indeed been instituted, the performance becomes separate. Separate, not unseparated brothers can bear witness, stand surety, make and accept gifts."[1] Similarly: "If many persons born of the same man be separate in transaction of affairs, and religious rites and have separate implements of work, and do not consult each other in all affairs, they may even give away or sell their own shares; they can do all this as they please; for they are masters of their own wealth."[2]

Brihaspati: "Coheirs, whether separated or unseparated, are alike in immoveable property; one is not qualified to give it away, to pledge, or to sell it."[3] Adhamána] pledging. This too is to facilitate the transaction of affairs and not to establish the fact of partition.

Here ends the Eighth Chapter of the Madana Parijata.

NOTES OF INDIAN CASES.

Muthayya Chetti v. Secretary of State for India. I. L. R., 22 M., 100. One is naturally tempted to ask the question, can this decision be good law? A piece of land, which, according to the finding of the High Court, must be taken to be the property of the Government, was occupied by the plaintiff as a trespasser. The Government instead of seeking to eject him by process of law adopted the unjustifiable procedure of imposing a penal assessment and compelling him to give up the land. He declined to pay, and, as regards some of the instalments, it was admitted that the Government destrained his goods. He paid the amount under protest and sued for the recovery of the money. Curiously enough *Boddam*, J., holds that the plaintiff's remedy is an action for illegal distress. A payment under pressure of coercive process, the legality of which *Boddam*, J., does not decide, is a payment which the person paying is entitled to recover if the coercive process was illegal. S. 72 of the Contract Act and the cases thereon are sufficient authority for the recovery of the money. But, of course, the question remains if the coercive process was illegal. The land was the property of Govern-

1. Narada, XIII. 36-39. 2. *Ibid* XIII. 42 and 43.
3. Brihaspati, XXV. 93.

ment, and we think there is no right to impose assessment upon it. Rent can only be recoverable by agreement of parties. Government might be entitled to damages for trespass, but that does not seem to be recoverable under the Act. We cannot but regret the conclusion that Government is at liberty to drive the trespasser away without going to regular courts of law like other persons whose properties have been trespassed upon by adopting the questionable and demoralizing procedure of imposing a penal assessment.

Sriramulu *v.* Ramasami, I. L. R., 22 M., 109. A petition for revision under S. 622 having been rejected, an appeal under the Letters Patent was preferred. *Davies* and *Boddam*, JJ., who delivered somewhat extraordinary judgments in the Full Bench Case of *Chappan* v. *Moidin Kutti*, I. L. R., 22 M., 68, held that there was no appeal. Merely declining to exercise the revisional power under S. 622 may not be a judgment, but dismissal of the petition in the exercise of the power is a judgment. We do not quarrel with the conclusion, but the reasoning is certainly peculiar. Mr. Justice *Davies* holds in the Full Bench Case that the revisional power does not fall within the words "appellate jurisdiction" of the Letters Patent.

The High Court has the power to frame rules for Benches of one or more Judges disposing of cases falling within the original or appellate jurisdiction. If revisional power does not fall within either of these jurisdictions according to *Davies*, J., it follows necessarily that a rule framed by the High Court authorizing one or more Judges to dispose of revision cases is *ultra vires*. His Lordship appears to us therefore to be wrong in relying upon the rule as a justification for one Judge disposing of a revision case.

Gur Prasad *v.* Ram Lal, I. L. R., 21 A., 20. It has been decided that the purchaser of the equity of redemption after a decree for the mortgage money has been passed in favour of the mortgagee, is the representative of the judgment-debtor within the meaning of S. 244. See *Ishan Chunder Sirkar* v. *Beni Madhub Sirkar*, I.L.R., 24 C. 62. *See* also *Paramanada Doss* v. *Mahabir Dossji*, I. L. R., 20 M., 378. It seems clear that the purchaser of attached property must stand upon the same footing and is entitled to raise any question under S. 244. It may be questionable whether in the absence of a subsisting attachment, and there is only a money decree, the purchaser of the judgment-debtor's property can claim to be representative. But the question in the case under notice seems to be free from difficulty.

Muhammad Husen *v.* Muzaffer Husen, I. L. R., 21 A. 22. In the case of a local Act where the last day for the filing of a suit happens to

be a Sunday the question is raised whether the period of limitation provided by the Act will be extended to the next day. *Aikman*, J., says 'no'. The learned Judge holds that S. 8 of the Limitation Act does not apply, nor the General Clauses Act of 1887. But the question is not considered whether there is any general principle, according to which there being an incapacity on the part of the Court to permit the act to be done by the party, time cannot be extended to the next court day. The Madras High Court apparently acted upon this rule. See *Aravamudu Aiyangar* v. *Samiyappa Nadan*, I. L. R., 21 M., 385.

SUMMARY OF RECENT CASES.

Will—Insane delusions—Relevancy.

Hope *v.* Campbell [1899] A. C. 1.

A testator left his properties in trust for certain religious and charitable purposes, namely, the promotion of total abstinence from the use of intoxicating liquors, the dissemination of the doctrines of Protestantism, the suppression of Popery, etc. His heir-at-law and next-of-kin brought an action against his trustees and executors for the cancellation of the will and for the recovery of his properties. The material averment of the 'pursuers' is as follows:—"Upon both the said topics"—referring to total abstinence from spirituous liquors and the Church of Rome—"he was subject to insane delusions." He believed that he had a special and imperative duty to further the cause of total abstinence and to oppose the Church of Rome by devoting his pecuniary resources to these objects, in consequence of commands which he had received from the Deity by direct communication upon various occasions. These insane delusions dominated his mind and overmastered his judgment to such an extent as to render him incapable of making a reasonable and proper settlement of his means and estate, or of taking a rational view of the matters to be considered in making a will." It was, however, admitted that in other respects he was sane and was actively engaged up to his death in carrying on a large business as writer to the Signet. On these facts and admissions, the Lord Ordinary and the Court of Session agreed in holding that the averments were insufficient to support the 'conclusions' of a summons.

Held on appeal to the House of Lords, (per Lords *Watson* and *Shand*, Lord *Davey diss.*) that a substantial issue had been raised by the averment and that the case must go to trial upon it.

Per Lord Davey:—The allegation amounts only to this that the testator "believed that the Divine Spirit spoke to him through his conscience and his action was directed by what he considered to be the command of the Almighty so conveyed." There is, therefore, no relevant averment of insanity, such as will support an action for the 'reduction' and cancellation of the will.

Prescriptive right—Statute—Extinction.

New Windsor Corporation *v.* Taylor [1899] A. C., 41.

Where an Act of Parliament "has 'embraced and confirmed' a right which had previously existed by custom or prescription, the right thenceforward exists by statutory right and the lower title by custom or prescription is merged in, and extinguished by, the higher title derived from the Act of Parliament."

The Municipal Corporation of New Windsor were from time immemorial in the habit of taking tolls for the passage over a wooden bridge crossing the Thames. In 1734 the Parliament passed a Statute, 9 Geo. II., c. 15, in which the prescriptive right was recited and the Mayor, &c., of Windsor were authorised to levy tolls for passage over the bridge of all hackneys, except those of freemen. This statute was repealed by 59 Geo. III., c. 126, which was to be in force for 21 years. At the end of this period, it was renewed by 5 Vic., c. 8, for 31 years. At the end of this latter period the Corporation made no attempt to have the statute renewed. But they levied tolls from the respondent under their prescriptive right. The respondent paid it under protest and brought action to recover the money so paid. The question for the Court was whether the prescriptive right to levy tolls had not been extinguished by 9 Geo. II., and whether in the absence of any subsisting statute authorising the levy of tolls the Corporation had the right to fall back upon their original customary right. *Russell*, C. J., gave judgment for the Corporation. The Court of Appeal (*A. L. Smith*, *Rigby* and *Collins*, L., C. J., reversed his decree and entered judgment for the plaintiff.

On appeal by the Corporation, *held* by the House of Lords that the statute recited the custom and authorised the levy of the customary toll with a slight modification, that thenceforward there was only a statutory right available to the Corporation, that the Corporation could not rely upon the prescriptive right after the expiry of the statute and that the judgment of the Court of Appeal should be confirmed.

Lottery—Prediction—Skill.

Hall v. Cox [1899] 1 Q. B., 198.

Where the result of a prize competition does not depend *entirely* upon chance, it is not lottery and the contract can be enforced. The defendant, editor of a newspaper, offered a prize for a correct prediction of births and deaths in London during a particular week. *Held* by the Court of Appeal reversing the order of *Lawrence*, J., that the competition required skill and knowledge of statistics and did not depend solely upon chance, and that, therefore, the contract not being in the nature of lottery could be enforced.

Railway Co.—Bicycle—"Ordinary luggage."

Britten v. G. N. R. Co. [1899] 1 Q. B., 243.

A passenger who carried a bicycle with him insisted upon being allowed to carry it without paying any special charge, as it was within the statutory weight allowed for each passenger. But the Company refused to carry it free of charge on the ground that a bicycle was not an 'ordinary luggage' within the Act. The passenger paid the charge under protest and brought an action to recover the money levied from him. *Held* by *Channell*, J., that the bicycle was not "ordinary luggage," and the Company was not bound to carry it free of charge, though within the weight allowed for each passenger.

Workmen's Compensation Act (60 and 61 Vict., c. 37), S. 1—Injury "arising out of or in the course of the employment."

Lowe v. Pearson [1899] 1 Q. B., 261.

The plaintiff "was employed in the mere manual labour of making balls of clay and handing them to the woman employed in working the machine. It was no part of his duty to touch the machinery; but on the contrary he was expressly ordered not to do so. In spite of these orders he meddled with the machinery and got his fingers injured." Under these circumstances he brought an action for compensation for injury "arising out of and in the course of his employment." The County Court Judge held that his object in meddling with the machinery having been the furthering of his master's work, he was entitled to compensation, notwithstanding the fact that it was no part of his duty to do it, and that he was not asked to do it on the particular occasion on which he injured himself. *Held* by the Court of Appeal in reversal of

this order, that the plaintiff had no business to approach the machinery, that, therefore, the injury could not be said to have arisen out of or in the course of the employment, and that the plaintiff was not entitled to maintain the suit.

Criminal jurisdiction—False representations made in Scotland—Goods obtained in England.

Reg v. Ellis [1899] 1 Q. B., 230.

The prisoner, a draper of Durham, obtained goods in Durham on false representations made by him in Glasgow. The question stated by *Day*, J., for the consideration of the Court of Crown Cases Reserved was whether the case was triable in England.

Held by *Hawkins*, *Wills* and *Bruce*, JJ., that the false representations made in Scotland were not in themselves criminal apart from the subsequent receipt of goods in pursuance thereof, and that the receipt of goods, which was the foundation of the indictment, having been in England, English Courts had jurisdiction to try the offence.

Held per *Wright*, J., that the larger question should be left open, but that the conviction of the lower Court should be affirmed on the ground that the possession of the goods by the prisoner might be treated as a possession in Gabeshead under a representation in Glasgow and continuing in Gabeshead (in Durham).

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following publications:—

The Law of Partnership, by A. Underhill, M.A., LL.D., published by *Messrs. Butterworth and Co., 7 Fleet Street, E. C., London.*

State Library Bulletin. Legislation No. 10 from the University of the State of New York.

Quarterly Advance Sheets of the General Digest, American and English, published by *The Lawyers' Co-Operative Publishing Company, Rochester, New York*:—Price $ 1/.

The Yearly Abridgment of Reports by Murray for 1898, published by *Messrs. Butterworth and Co., 7 Fleet Street, E. C., London*:—Price S. 12/6.

The Lawyer and Magistrate, Nos. 3, 4 and 5 (*in exchange*).

The Bombay Law Reporter for March (*in exchange*).

The Albany Law Journal for March (*in exchange*).

The Calcutta Weekly Notes for March (*in exchange*).

The Allahabad Weekly Notes for March (*in exchange*).

The Green Bag for March (*in exchange*).

The Canadian Law Times for March (*in exchange*).

The Canada Law Journal for March (*in exchange*).

The Educational Review for March (*in exchange*).

The Indian Journal of Education for March (*in exchange*).

The Harvard Law Review for March (*in exchange*).

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Vakil carrying on business :—A notification has been issued by the High Court and published in the *Fort St. George Gazette*, that a vakil carrying on any trade or business without the leave of the Court shall be liable to suspension or dismissal. This rule appears to have been framed in consequence of a vakil of the High Court practising in the moffusil having carried on the business of a cloth merchant. We have no doubt that it is undesirable that members of an honorable profession should be simultaneously engaged in the business of a trader along with the active practice of the profession. We are not aware of any other instance of a vakil engaged in any similar trade or business. Professional opinion ought to be sufficient to check any practice of this kind inconsistent with the traditions of the bar. An appeal by the High Court to the body of professional gentlemen in Madras and in the moffusil would have been quite enough to preserve the profession from mistakes of the kind that has come under the notice of the High Court.

The promulgation, however, of a rule like the one under notice appears to us to be alike illegal and undesirable. In the case of pleaders the High Court has the power under S. 6 of the Legal Practitioners' Act to frame rules for their suspension and dismissal, and the rule has been made by the High Court at Madras that the carrying on of a trade or business would render a pleader liable to suspension or dismissal. But in the case of advocates, vakils and attorneys of the High Court, the High Court has the power to make rules for the qualification and admission of proper persons, but there is no power to make rules for their suspension or dismissal. The Letters Patent simply say: " The

High Court has power to suspend or remove from practice on reasonable cause." The reasonable cause is a matter for judicial determination in each case by the court as a judicial body upon the circumstances placed before them. A judgment of the High Court judicially pronounced as to what is reasonable cause may have a binding authority like any decision of the Court. But an extra-judicial rule framed without reference to any case which has come up judicially before the Court cannot have any binding force upon the court which may have to determine the question in any particular case. The power to suspend or dismiss a vakil being no part of the original or appellate jurisdiction, for the exercise of which the power to form Benches is conferred under S. 13 of the Charter Act, has to be exercised by the whole High Court upon any complaint made, or of their own motion, against any advocate, vakil, or attorney charged with misconduct. The exercise of such a power depending upon judicial precedents in this country and in England as to what constitutes reasonable cause cannot be fettered by any rule framed in *camera*. Nor does it appear to us that there is any power to frame rules in the matter under S. 15 of the Charter Act which confers the power to frame rules of practice for subordinate Courts, or under S. 652 of the Code of Civil Procedure which authorizes the High Court to make rules consistent with the Code to regulate any matter connected with its own *procedure*. It is hardly necessary to observe that the suspension of an advocate or vakil is not a matter connected with the procedure of the Court.

We said that the rule was also undesirable. In the first place there is no reason why the rule should be made applicable to vakils alone. If the carrying on of a trade or business is objectionable in their case, it is equally objectionable in the case of advocates and attorneys. Again, the rule is very vague, for it is difficult to define what a business is.

We have no doubt that the promulgation of the rule is well-meant. But the Judges could hardly have realized the scope of the words employed at the time when the draft was under their consideration. In one sense the conduct of this journal may be business. Lending money on the security of property out of professional savings may be business. But we can hardly suppose—indeed we are assured—that these instances were never intended to fall within the rule. There are many things which should be left to the good sense of the profession and the general body of public opinion to be regulated. The framing of rules not carefully considered with reference to actual facts and not subjected to any criticism before they are authoritatively issued is always beset with the

danger of striking at things never intended to be prohibited. We trust that the rule under notice will be withdrawn before long.

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Enrolment of Vakils.—There have been two instances during this year when enrolment was refused. Two apprentices had each served a year under a professional gentleman practising in the High Court. One of the cases was a very gross case of a man who had beendismissed from the public service for gross misbehaviour, but who after his dimissal took his B.L. degree and served his apprenticeship without informing his master of his previous history. Somehow the circumstances were brought to the notice of the Court, and when the motion came to be made, the Chief Justice ascertained on a careful examination that the applicant was thoroughly unfit to belong to an honorable profession and refused his enrolment. It is a pity that the motion should at all have been made in this case.

The rules in regard to enrolment provide that a notice should be given by each applicant four weeks before enrolment in the *Fort Saint George Gazette* of his intention to apply, and also by publishing it on the notice board of the High Court. It is impossible to expect vakils of the High Court, or any persons interested in the honor of the profession, to be on the look-out for such notices and then to satisfy themselves as to whether the applicant is a man of good character. We think a rule should be framed requiring each apprentice-at-law within 30 days after signing the contract to notify to the Vakils' Association the fact of his having entered into the contract of apprenticeship. This will give members of the association an opportunity to inquire and to satisfy themselves as to the fitness of the candidates for enrolment and to oppose if necessary the admission of any objectionable candidate.

As regards the other case, we regret we cannot agree with the view taken by the Court in the peculiar circumstances in which the application was made. The applicant was a First-grade Pleader and some time a Police Inspector. It is said that he resigned the service under somewhat discreditable circumstances, and his pleader's certificate was in consequence not renewed for one year. It is pretty certain that the certificate would have been renewed after the lapse of that year. The applicant, however, thought of utilizing the year's suspension by going through a course of apprenticeship for enrolment as a vakil of the High Court. Before entering upon the course of apprenticeship, he took the opinion of the High Court by placing the circumstances in connection with his previous history before the Judges. The Judges endorsed their order

upon the petition that he was at liberty to apprentice himself, but should not practice as a pleader. It is true that the Judges were not bound to give this opinion, but it is impossible to regard this as anything but a sanction of the course the applicant proposed to adopt. In the face of all this to tell the applicant that the High Court was not bound to advise, and that the order meant that the applicant was free to act as he pleased, was to put a construction utterly at variance with the letter and spirit of the order and with the previous refusal to renew the pleader's certificate for a year only. It is true that the applicant was permitted to renew his application before *Shephard* and *Davies*, J.J., but we think the refusal was extremely unfair to the applicant. The matter might be viewed differently, but for the previous orders of the High Court. We do not mean to suggest that because a man told a lie once, for which he was adequately punished, he should ever afterwards be precluded from entering into a profession which is a means of honorable employment. But there would not be the same sympathy with the applicant as there undoubtedly is at present in the circumstances in which the application was refused.

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Ways of necessity—what are they?—It is a common impression that a way of necessity may be demanded wherever a landowner finds that he has no access to his property except over the lands of others. That this impression is mistaken is shown by the case of *Ellis* v. *Blue Mountain Ass'n*, 41 Atl. Rep. 856, decided by the Supreme Court of New Hampshire. There the plaintiff owned a farm situated in the centre of Corbin Park—a game preserve. A public highway running completely through the park was the sole means of access to the farm. The owner of the park prevailed on the town officials to exercise their statutory authority and abolish this highway; whereupon the plaintiff filed a bill to have a way of necessity laid out and to have the park owner enjoined from allowing his wild animals to trespass on the plaintiff's land. The injunction was granted, but the way was refused. The result is peculiar. The farm is carefully protected for the plaintiff's advantage, but he is unable legally to set foot on it. The Court place the decision on the ground that while necessity may serve as a basis for an implied grant or reservation, yet where, as here, there can be no question of grant or reservation necessity in itself cannot entitle to a way. In contradiction of this reasoning, the early English cases laid emphasis on the bad policy of tying up lands, and granted ways on the ground "that the public good required that the land should not be unoccupied." *Dutton* v. *Taylor*, 2 Lutw. 1487. Later this reasoning was doubted by Lord Kenyon in *Hawton* v. *Frearson*, 8 T. R. 50; and in *Bullard* v. *Harrison*,

4 Maule & S. 317, Lord Ellenborough held that, where no grant could be implied and where no prescription could be alleged, no degree of necessity could create an easement. The English law is settled in accordance with this case. In America the courts almost without exception have taken the same view. *Tracy* v. *Atherton*, 35 Vt. 52.

As a matter of principle, the accepted doctrine seems correct. It is harsh dealing to allow one person to impose such a burden upon an utter stranger for private advantage, and without compensation. It is hard to find a principle that will justly determine which of several surrounding landowners, all free from fault, must give gratis to the owner inside. The cases of grants implied from necessity can give no support to the contention against the principal case; for in these cases the way is not given because of the necessity in itself, but because the necessity has come to be considered proof that a way was intended to pass as incident to the original grant. The fact that the need of a way may suffice to show this intention is no ground for saying it will justify the appropriation of a stranger's land.

Again the reasons of policy set forth by *Dutton* v. *Taylor* are not so urgent practically as theoretically; as a matter of fact land will rarely remain tied up any length of time for want of a way. There are several remedies. The owner may sometimes, as he would have been allowed to do in this case, enter by license of the other landowner. He may often purchase a right of way. He may petition to have a highway laid out. He may finally be rid of the whole matter by selling out to the adjoining owners. To grant such ways would radically disturb private property rights, and the hardships and injustice incident to this disturbance would seem to outweigh the benefits. It may then be said both on principle and authority that what is generally termed a way of necessity is merely a necessary incident to a grant, that pure necessity in itself cannot authorize the appropriation of another's land, that the right to a way of necessity properly so called does not exist:—*Harvard Law Review.*

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Damages for mistakes in telegrams.—The accepted rule as to the damages recoverable for the breach of a contract to transmit a telegram is boldly ignored in a late case. The plaintiff gave to the defendant, a telegraph company, for transmission to his attorneys, a message which read: "Attach property for seven hundred ninety dollars;" as delivered it read: "Even hundred ninety dollars." The attorneys attached for the latter amount, and thereby the remainder of the plaintiff's claim was

lost. The court assumed in their decision that the defendants are liable for the full amount of this loss. *Western U. T. Co.* v. *Beals*, 76 N. W. Rep. 903 (Neb.).

In the case of a negligent transmission of a telegram the courts have almost universally applied the general rule of *Hadley* v. *Baxendale*, 9 Exch. 341, which limits the consequential damages for a breach of contract to those within the contemplation of the parties at the time of entering into the agreement. So in every case the struggle at the trial is to show one of two things : either an actual notice, given by the sender to the operator, of the possibility of special damage, or a constructive notice given to him by the very words of the message. *Western U. T. Co.* v. *Landis*, 18 Ill. App. 57; *Squire* v. *Western U. T. Co.*, 98 Mass. 232. Upon the latter point there seem to be two lines of decisions, the first logically adhering to the rule and requiring the message to give the operator specific notice of the possibility of loss, the second holding it sufficient if the business importance of the message appears clearly. *Primrose* v. *Western U. T. Co.*, 154 U. S. I; *Postal T. Co.* v. *Lathrop*, 131 Ill. 575. In either case the remedy is notoriously inadequate. Accordingly, some few courts, not relying upon any principle but frankly recognizing the anomaly, have refused to apply the rule of *Hadley* v. *Baxendale*, *supra*; *Western U. T. Co.* v. *Way*, 83 Ala. 542; *Western U. T. Co.* v. *Reynolds*, 77 Va. 173.

This judicial legislation, and the numerous modern remedial statutes, lead one to question whether the law of damages has been properly applied to the case of the telegram. Damages flowing from a breach of contract are of two kinds,—direct and consequential. It is only in the case of consequential losses that the rule of *Hadley* v. *Baxendale* is law. But is not the damage in the case in hand direct ? The direct loss, as in all cases of breach of contract, is the value of the contract. The telegraph company has failed to deliver the information given to it ; the value of the contract lost is, then, the value of the information transmitted. In an analogous case a common carrier without notice is held for the value of a package negligently lost. So in the principal case the court correctly assumes that the measure of damages is the difference between the sum attached for and the debt. A solution of all difficulties, then, would seem to be to recognize that the loss of the intelligence is a direct loss, and that the standard of damages is the inherent value of that information :—*Harvard Law Review*.

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Carriers—Throwing packages from moving trains.—A news agent threw a package of papers from defendant's train while it was passing through a small station, and the package struck and injured the plaintiff. The news agent was not a servant of the defendant, but it was customary to throw packages from the train. *Held*, that a nonsuit is not error. *McGrath* v. *Eastern Ry. Co.*, 77 N. W. Rep. 136 (Minn.).

The plaintiff must show negligence on the part of the defendant; but, even if the act is not done by a servant of the company, the courts hold it liable if the act is done in accordance with a dangerous custom known to the company. *Galloway* v. *Chicago R. R. Co.*, 56 Minn. 346; *Snow* v. *Fitchburg R. R. Co.*, 136 Mass. 552. The court in the principal case directed a nonsuit, on the ground that there was no evidence of negligence, since the custom was not dangerous. In a similar case, however, where a company allowed its employés to throw sticks of wood off the train at their various homes along the line, a nonsuit in the lower court was held to be error. *Fletcher* v. *Baltimore & P. R. R. Co.*, 168 U. S. 135. There is very little authority on the point; but since it is purely a question of fact, it is hard to support the peremptory action taken by the court in the principal case, which seems very close to the line:—*Harvard Law Review.*

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Contract—Damages—Mistake in Transmission of Telegram.—A message was given by the plaintiff to the defendants, a telegraph company, for transmission to his attorneys, which read: "Attach property for seven hundred ninety dollars;" as delivered it read: "Even hundred ninety dollars." The attorneys attached for the latter amount. In a suit for the loss caused thereby: *held*, that the defendants are liable for the remainder of the plaintiff's claim. *Western U. T. Co.* v. *Beals*, 76 N. W. Rep. 903 (Neb.):—*Harvard Law Review.*

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Contracts—Void conditions.—A clause in an insurance policy provided that no action thereon should be sustainable at law unless brought within twelve months after the occurrence of the loss. *Held*, that it is against public policy to allow parties to fix a time within which an action may be brought different from that set in the Statute of Limitations. *Omaha Fire Ins. Co.* v. *Drennan*, 77 N. W. Rep. 67 (Neb.).

The same result has been previously reached in Nebraska. *Miller* v. *State Ins. Co.*, 54 Neb. 121. *Accord*, *French* v. *Lafayette Ins. Co.*, 5 McLean, 461. By the great weight of authority, however, the clause in

the principal case is held to be valid. 2 Wood, Fire Insurance, 2d ed., § 460. What consideration of policy or principle of law is offended by such a condition does not seem clear. The Statute of Limitations confers no new right of action but merely restricts the time, otherwise unlimited, within which an existing right may be asserted. It seems to be wholly within the spirit of this enactment, if not in actual furtherance of its design, that parties, in forming a contract, should still further limit the time allowed them for bringing actions thereon. Cf *Riddlesbarger* v. *Hartford Ins. Co.*, 7 Wall. 386. The holding in the principal case places an apparently unwarranted restriction on a person's freedom to contract :—*Harvard Law Review.*

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Criminal Law—Arson.—A house was blown up with dynamite, and splinters were torn from the roof and fired by the explosion. *Held,* that this does not constitute arson. *Landers* v. *State,* 47 S. W. Rep. 1008 (Tex., Cr., App.).

The case raises a novel point. It is clear that the burning of parts of a house, already detached, is not arson. *Mulligan* v. *State,* 25 Tex. App. 199. In the principal case, however, the splinters were set on fire and detached simultaneously. The court, doubtless, reaches a sound result, for even if it could be said that the splinters were fired while at part of the house, still there was no burning of them in the sense of that term as used in connection with arson, till after they were detached. 2 Bish., Cr. L., § 10 :—*Harvard Law Review.*

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Property—Injunction—Common-law-Copyright.—Complainant society filed a bill to enjoin defendants from using, as an advertisement of a medicine, extracts from a committee report read at a meeting of complainant society. By affidavits it appeared that persons were present at the meeting who were not members, but it did not appear that the meeting was open to the general public. On a motion for a preliminary injunction upon the affidavits; *held,* that publication of the report is not shown, and complainant is entitled to the relief asked. *New Jersey State Dental Society* v. *Denticura Co.,* 41 Atl. Rep. 672 (N. J., Ch.).

A common law right of property in an unpublished writing, whatever may be the theoretical objections to it, is generally recognised in this country. *Tompkins* v. *Halleck,* 133 Mass. 32. But *cf.* PARKE, B., in *Jefferys* v. *Boosey,* 4 H. L. Cas. 815, 919. Publication then is held to dedicate this property to the public. No such dedication is found in the

principal case, and the conclusion seems correct. Too much stress is perhaps laid on complainant's intention not to dedicate; no one who publishes a book intends to part with the work itself, as a piece of literary workmanship. Nor is the fiduciary position of the hearers of much importance as touching the mere fact of publication. The owner of the writing is the person to look at; what he did is the question. Under all the circumstances, the act of complainant society in the principal case hardly constitutes an abandonment to the public at large. See 12 *Harv. Law Rev.* 51:—*Harvard Law Review.*

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Quasi-contracts—Money paid for illegal purposes.—The defendant falsely represented to the plaintiff that a criminal prosecution had been instituted against the latter, and obtained money from him to bribe the prosecuting officer to stop proceedings. *Held*, that the plaintiff can recover the money. *Smith* v. *Blachley*, 41 Atl. Rep. 619 (Pa.).

The decision seems correct. The plaintiff's illegal intention in giving the money to the defendant should not bar his recovery unless it is against public policy. The test applied by the courts in similar cases seems to be, whether recovery will give effect to the illegal transaction, or whether it will prevent its performance. Thus in the analogous case of money paid under an illegal contract, it is generally held that the money can be recovered at any time before the contract is performed. *Spring Co.* v. *Knowlton*, 103 U. S. 49; *Duval* v. *Wellman*, 124 N. Y. 156; *Taylor* v. *Bowers*, 1 Q. B. D. 300. But when the illegal transaction is partly or wholly performed, the courts will not allow either party to take advantage of its illegality; and therefore money paid under it cannot be recovered. *Kearley* v. *Thomson*, 24 Q. B. D. 742; *Tyler* v. *Carlisle*, 79 Me. 210. In the principal case the money had never been applied as the defendant represented, and since the plaintiff did not rely on any illegal contract, and the transaction was still unperformed, recovery was properly allowed. *Catts* v. *Phalen*, 2 How. 376:—*Harvard Law Review.*

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Trusts—Fraud by agent—Statute of frauds.—Defendant orally agreed to act as agent for plaintiffs to purchase certain land in their name. He, however, had the conveyance made out to himself, paid for it with his own money and denied the agency. *Held*, that defendant is liable to plaintiffs as trustee *ex maleficio*. *Halsell* v. *Wise County Coal Co.*, 47 S. W. Rep. 1017 (Tex. Civ. App.).

There is much authority holding that the defendant is not liable on these facts, on the ground that the trust is created by the agreement of agency, and so is within the section of the Statute of Frauds requiring declarations of trusts in land to be in writing. *Burden* v. *Sheridan*, 36 Iowa, 125; *Nestal* v. *Schmid*, 29 N. J. Eq. 458. The result in the principal case seems more just and to be reached by sounder reasoning. Agency, though created by an agreement, is properly a relation or status, which, for a particular purpose, is fiduciary, and involves the devotion of the agent to his principal's interests. An abuse by the agent of this fiduciary relation is a fraud on his principal, and renders him liable for the proceeds of his wrongful act as a constructive trustee. This trust, then, really results by operation of law, and so is not within the Statute of Frauds. Browne, Statute of Frauds, § 96; *Winn* v. *Dillon*, 27 Miss. 494; *Jenkins* v. *Eldredge*, 3 Story, 181, 290:—*Harvard Law Review*.

Notes of American Cases.

The rule that a drawee bank is bound to know the signature of its depositor is applied in *First Nat. Bank of Belmont* v. *First Nat. Bank of Barnessvie* (Ohio) 41 L. R. A, 584, with the effect of denying the right of a bank which has paid a forged check to obtain repayment from the party to which it paid the money.

***

The fact that a bank depositor procures a rubber stamp which will make a fac simile of his signature, while the bank has no notice of that fact, is held, in *Robb* v. *Pennsylvania Company for Insurance*. (Pa.) 41 L. R. A. 695, to be insufficient ground for charging him with the loss when the bank pays a check to which his name was forged by a clerk who clandestinely obtained and used the stamp for that purpose.

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A woman who undertook to get on a mixed train at a distance from the depôt while the train was being made up, without any invitation to get on it at that place, is held, in *Jones* v. *New York Central & H. R. R. Co.* (N. Y.) 41 L. R. A. 490, to have no right of action for injuries sustained by the sudden jolting of the car as she was getting on.

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An experienced traveller who steps out of a sleeping car and falls upon the track when he supposes he is entering the car closet, while

the train is passing through a tunnel and the car is dark, at about 6 o'clock in the morning, is held, in *Pipper* v. *New York Centra & H. R. R. Co.* (N. Y.) 41 L. R. A. 724, to be guilty of such negligence as will preclude his recovery even if the carrier is negligent.

***

An agreement by an attorney to prosecute a suit entirely at his own expense, in consideration of one half the recovery, is held, in *Johnson* v. *Van Wyck* (D. C.) 41 L. R. A. 520, to be void for champerty.

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The question whether contributory negligence as a defense is to be determined by the law of the forum or the law of the place of injury is one of some novelty, but it is held, in *Louisville & N. R. Co.* v. *Whitlow* (Ky.) 41 L. R. A. 614, that the law of the place of injury governs.

***

A State constitution reducing the number of a grand jury and permitting conviction by less than a unanimous vote of the petit jury is held, in *State* v. *Caldwell* (La.) 41 L. R. A. 718, to be valid as applied to the prosecution of crimes previously committed, and not to be an ex post facto law, because the changes relate merely to the remedy.

***

A statute making it an offense to have possession of prohibited articles which are of no lawful use, such as a record of numbers drawn in a lottery, or of a lottery ticket, is held, in *Ford* v. *State* (Md.) 41 L. R. A. 551, to be constitutional, and ignorance of the character of the articles is held to constitute no defense.

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The measure of damages for coal taken by a tenant in common without right, but in good faith, believing he had title, is held, in *Keys* v. *Pittsburg & W. Cool Co.* (Ohio) 41 L. R. A. 681, to be of the value of the coal in place at the time it was mined.

***

An electric passenger railroad on a country high way is held, in *Zehren* v. *Milwaukee Electric R. & L. Co.* (Wis.) 41 L. R. A. 575, to constitute an additional burden which requires the consent of the abutting owner and payment of compensation.

***

A Bible containing names and dates of birth of members of the family is held, in Supreme Council of the *Golden Star Fraternity Cenkinklin* (N. J.) 41 L. R. A. 449, to be inadmissible as evidence of the age of a person, when there is no proof when or by whom the entries were made, or of the writer's knowledge of the facts, or that the persons named therein had ever acknowledged the authenticity of the record.

***

The rule that a presumption of negligence does not arise from the fact of an injury is applied in *Benedick* v. *Petta* (Md.) 41 L. R. A. 478, where a person on a mimic railway was on a car when it entered a tunnel but was not on it when it emerged and was found unconscious in the tunnel, while other persons passed through safely, and there was no defect in, or abnormal condition affecting, the means of transportation.

***

The presumption against suicide is held, in *John* v. *Northwestern Mut. Rel. Asso.* (Wis.) 41 L. R. A. 587, insufficient to sustain a cause of action for accident insurance, where the insured went to bed as usual, was found next morning in an underground cistern back of the house, with underclothes, pants, and stockings on, but no coat, and the opening to the cistern was 15 by 20 inches.

***

Preference of usurious debts is held, in *Hiller* v. *Ellis* (Miss.) 41 L. R. A. 707, to make an assignment for the benefit of creditors void. This is a subject on which there are not many authorities, and these are not agreed, but their effect is shown in a note to this case.

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Payments by the maker of a note are held, in *Maddox* v. *Duncan* (Mo.) 41 L. R. A. 581, ineffectual to interrupt the running of statute of limitations as to an indorser.

A partial payment by a principal debtor or his absence from the state is held, in *Mzoingo* v. *Ross* (Ind.) 41 L. R. A. 612, ineffectual to suspend or interrupt the statute of limitations in favor of his surety.

***

The theory that a landowner owes no duty of protection to a trespasser upon his land when the owner does not know of the trespass or in any manner induce it is denied in *O'Learg* v. *Brooks Elevator Co.* (N. D.) 41 L. R. A. 677, and, as he owes him no duty, it is held that he

cannot be liable for negligence toward him. This was a case of injury to a child by a dangerous shaft or tumbling rod running across a place where boys were sometimes accustomed to play.

***

The theory that the negligence of a parent or guardian can be imputed to an infant so as to preclude its right of action against a third person for negligence, which has been gradually repudiated in nearly all jurisdictions, is now repudiated also in Indiana, in the case of *Evansille* v. *Senhenn* (Ind.) 41 L. R. A. 728, which overrules prior decisions on the subject.

***

The ineligibility of a woman to be a notary public is decided in state, *ex rel. Monnett* v. *Adams* (Ohio) 41 L. R. A. 727, on the ground that the constitution requires every officer to be an elector and every elector to be a male citizen.

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Liability of a partner for a penalty on account of the acts of a co-partner, done without his knowledge or consent, is denied in *Willams* v. *Hendricks* (Ala.) 41 L. R. A. 650, in a case as to a penalty for cutting trees. But the liability of an employer in a penalty for the acts of his employé is sustained in *Bryan* v. *Alder* (Wis.), 41 L. R. A. 658, where the penalty was imposed for refusal to serve a colored patron in an eating house. On the other hand, the employer's penal liability for an overcharge by a conductor, which was not authorized or approved by the employer, is denied in *Hall* v. *Norfold & W. R. Co.* (W. Va.) 41 L. R. A. 669. A question of great interest raised by these cases, as to the criminal and penal liability of a person for the act of his co-partner, servant, or agent is considered in an extensive note to these cases, reviewing the large number of decisions which touch the matter. The decisions are conflicting, but there are many which hold an employer liable to a penalty for acts of servants or agents which he has not authorized, if they are done in the scope of employment.

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The suspension of a pupil because of a misconduct of the pupil's mother in entering the school room during school hours and using offensive or insulting language to the teacher is upheld in *Board of Education of Cartersville* v. *Purse* (Ga.) 41 L. R. A. 593, even if the child had not been guilty of any violation of the rules of the school. This decision is a novel one, but there are many cases concerning the suspension or expulsion of pupils which are presented in the annotation to this case.

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The exaction of toll from a bicycle rider on a turnpike is held, in *Gloucester & S. Trup Co.* v. *Leppee* (N. J.) 41 L. R. A. 457, to be unathorized by a charter giving a right to toll for every carriage drawn by one or more beasts, and the right to stop any person driving any carriage of burden or pleasure who attempts to pass the gates without paying toll.

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The use of the name of a place as a trademark for shoes which are not made there, in order to get the advantage of the repution of shoes made at that place, is held, in *Coelman, B. & W. Co.* v. *Dannenberg Co.* (Ga.) 41 L. R. A. 470, to be such a deception as would prevent the protection of such trademark by a court of equity.

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Coercion of a jury for which a verdict will be avoided is held, in *People* v. *Sehldon* (N. Y.) 41 L. R. A. 644, to be shown when the jury agreed only after being out eighty-four hours, without beds or cots during forty of which they were confined in a small room, and had reason to believe, from the remarks of the court and the treatment given them, that a still longer confinement on chairs and benches was in store for them, while the judge also told them, on a report that they could not agree, that their failure to agree was "almost to confess incompetency."

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Taking testimony away from the court room, at the house of the plaintiff, to which judge and juriors go for that purpose, against the defendant's objection, is held, in *Selleck* v. *Janaville* (Wis.) 41 L. R. A. 563, to be, at most, an irregularity which is not sufficient to deprive the court of jurisdiction or nullify the judgment. The decisions as to the validity of proceedings in the course of a trial outside the court room are not numerous, but those that have been made are presented in a note to this case.

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Absence of a judge from the court room for about twenty minutes on a trial for felony, which goes on during his absence with a member of the bar presiding, is held, in *Ellerbee* v. *Staate* (Miss.) 41 L. R. A. 569, to amount to a dissolution of the court which makes the trail void. This decision is sustained by a considerable body of prior decisions on the subject, which are collected in the annotation to the case.

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The unborn heirs of a person against whose estate an action is brought to establish claims, to which living heirs of the same class are made parties, are regarded, in *Horrison* v. *Turnbell* (Va.) 41 L. R. A. 703, as parties by representation and bound by the decree as effectually as if they had actually been parties to the action.

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The right of passage on a navigable stream is held, in *Coyne* v. *Mississipi & R. River Boom Co.* (Minn.) 41 L. R. A. 494, to be a common and paramount right, which includes the right to float logs, if they are driven in an ordinarily careful and prudent manner, and in such case the party driving them is not liable for damages which may result to riparian owners. This decision is supported in the main by the other cases on the subject, which are collected in the annotation thereto.